DOCUMENT RESUME

ED 224 388 HE 015 651

AUTHOR Webb, Melvin W.
TITLE Desegregation of Higher Education: A Look at Political and Legal Issues Prior to "Brown v. Board of Education."
PUB DATE [80]
NOTE 38p.; This paper was identified by a joint project of the Institute on Desegregation at North Carolina Central University and the ERIC Clearinghouse on Higher Education at The George Washington University.
PUB TYPE Viewpoints (120) -- Information Analyses (070) -- Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Access to Education; *Black Students; College Admission; *College Desegregation; *Constitutional Law; *Court Litigation; Educational Legislation; Elementary Secondary Education; *Equal Education; Government School Relationship; Higher Education; Legal Responsibility; Political Influences; Public Education; Public Opinion; Public Policy; *Racial Segregation; State Colleges
IDENTIFIERS *Brown v Board of Education; Supreme Court

ABSTRACT

The political and legal forces that shaped opinion and government action prior to the Supreme Court decision of Brown v. Board of Education of Topeka (1954) are examined, along with constitutional interpretations concerning education and desegregation, federal and state statutes related to desegregation, and cases since Roberts v. City of Boston (1849). Focus is on desegregation of public colleges and universities, with the exception of two notable cases. Roberts v. City of Boston was the first notable case addressing the admission of blacks into white schools and dual systems. The Brown case ruled that the doctrine of separate but equal schools for blacks and whites was unconstitutional; although public elementary and secondary schools felt its immediate impact, it soon severely affected higher education. While at first the provisions of the 14th Amendment for equal protection of the law was applied only to political situations, the court slowly recognized social inequality as being as pervasive, and possibly more destructive, than political inequality. In 21 states, statutes had either mandated or allowed segregated higher education, and the federal government had not intervened in a matter that was considered a state's right. Behind the scenes political pressures in the Southern states had made desegregation of higher education a very unpopular issue for Congress. It is recommended that college administrators be attuned to U.S. Supreme Court decisions when developing policies related to admissions, affirmative action, and program duplication. (SW)

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DESEGREGATION OF HIGHER EDUCATION: A LOOK AT POLITICAL AND LEGAL ISSUES PRIOR TO "BROWN V. BOARD OF EDUCATION

Melvin W. Webb
School of Education
North Carolina State University
Raleigh, North Carolina 27650

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NORTH CAROLINA CENTRAL UNIVERSITY
DURHAM, NORTH CAROLINA 27707

INSTITUTE ON DESEGREGATION

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COOPERATIVE PROJECT

This paper has been identified by a joint project of The Institute on Desegregation at North Carolina Central University and ERIC Clearinghouse on Higher Education at George Washington University. The purposes of this project are to identify, collect, and make available literature concerned with

(1) the problems of minority students in higher education in general and
(2) the problems of desegregation in historically black colleges and universities in particular.

New published and unpublished materials are reviewed and recommended by participants of the Institute on Desegratation's Interinstitutional Research Group (ID/IRG) for acquisition by ERIC Clearinghouse on Higher Education. An annual bibliography of this material will be published under the names of ERIC and the Institute.

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NORTH CAROLINA CENTRAL UNIVERSITY IS A CONSTITUENT INSTITUTION OF THE UNIVERSITY OF NORTH CAROLINA

INTRODUCTION

In 1935 Edward C. Elliott (then President of Purdue University) and M. M. Chambers (American Youth Commission of the A.C.E.) undertook an examination of the relationship between higher education and the judicial branch of the government, and happened to delve into the controversial subject of desegregation of colleges and universities during the course of their work. They did not like what they found, especially in the Southern States. Their 1935 report on the state of desegregation in higher education would have remained essentially the same had they repeated it during the next 19 years, and would have been equally correct in 1865. In summary they said: (Elliott and Chambers, 1936., p. 12)

> "Institutions of higher education in the states of the North and West generally admit students of all races on equal terms; but in the South separate institutions are maintained for the white and Negro races respectively, and frequently the teaching of students of both races in the same classes is forbidden by law. Often the institutions for Negroes do not embrace adequate facilities, or indeed any facilities at all, for advanced graduate and professional study."

Nineteen years later, when the U.S. Supreme Court handed down its decision in Brown v. Board of Education of Topeka (347 U.S. 483; May 17, 1954), a new era was ushered in for public education in the United States. The doctrine of "separate but equal" schools for blacks and whites, made mandatory through legislation enacted by seventeen states (Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, W. Va. and the District of Columbia,) and optional by

state constitutional provision in Arizona, Kansas, New Mexico, and Wyoming, was held to be unconstitutional by the U.S. Supreme Court, in violation of the Fourteenth Amendment's declaration that "no State---shall deny to any person within its jurisdiction the equal protection of the laws." For the first time (in relation to public education) the Court had called upon Constitutional grounds to rule that no State, nor its agent, could arbitrarily deny any rights or privileges to one group that it granted to another (i.e. education), especially if that group was classified on the grounds of race.

Having rested their position regarding "separate but equal" institutions for higher education since 1896 on the U.S. Supreme Court's opinion in Plessy v. Ferguson (163 U.S. 537; 1896), legislators and educators, primarily in the South, were faced with the enormous and complex task of desegregating their public colleges and universities. For while Brown's immediate impact was felt by public elementary and secondary schools throughout the country, the effect of Brown and the other so-called school segregation cases was soon to be felt more severely by higher education. Although requirements of the Constitution as interpreted by the Courts, and legislated in the forthcoming Civil Rights Act of 1957, were essentially the same for public elementary and secondary schools as for public higher education in regard to desegregation, higher education differed in several important respects from public schools; differences which made their compliance with the law much more difficult. For instance, unlike public school education, higher education was neither compulsory nor universal, but was based on the premise that not all youth need nor can benefit from

post secondary study, and was therefore selective in nature. Unlike the universal age and place of residence requirements for entrance into public elementary and secondary school, colleges and universities had a veritable plethora of factors affecting admissions, ranging from scholastic achievement to whether or not an applicant's parents were alumni. And while public school education was free (or virtually free) in every state, public higher education required tuition and other fees for admission. These characteristic traits of college and university admissions, as true today as in 1954, when coupled with the traditional freedom of higher education from government regulation and control, have proven to be somewhat incompatible with the laws and regulations concerning desegregation. This incongruity between guidelines, laws, and regulations concerning admissions requirements and dual system maintenance, and the actual practices of higher education, has accounted for the bulk of administrative and legal headaches, past and present, for the courts, the colleges, and the executive agencies of the government charged with enforcement of desegregation policy.

In order to better understand the present state of desegregation in higher education, the political and legal forces which shaped public opinion, legal opinion, and government action prior to Brown need to be examined. To do so, a systematic review of constitutional interpretation concerning education and desegregation, of federal and state statutes related to desegregation, and of cases from Roberts v. City of Boston (1849) to Brown was undertaken. I was tempted to also try and wade through the complex social issues surrounding the events leading up to the Civil War, and their influence on the topic at hand, but felt that

an objective look at desegregation from a legal and political perspective would be of more value. Therefore the paper is presented in sections, as follows:

Section I: Constitutional Interpretation Prior to "Brown"
Section II: Statutes - Federal and State
Section III: Cases - From "Roberts" to "Brown"
Section IV: Conclusions

Because the law differs concerning desegregation of private institutions of higher education and public institutions, I have chosen to examine only the desegregation of public colleges and universities in this paper, with the exception of two notable cases. Therefore, when referring either to education or higher education, I am really speaking of public education.

Constitutional Interpretation Prior to "Brown"

When examining the history of desegregation cases the first thing that stands out is the fact that, prior to 1954, the U.S. Constitution and the Fourteenth Amendment to the Constitution (as applied to both education and to discrimination in education) were interpreted by the U.S. Supreme Court - and hence the lower courts on both the federal and state levels - in an entirely different manner than is true today.

In 1787, when the Constitution of the United States was ratified, no mention of education was made, nor has any specific reference been made through amendment since. In order to understand, then, how the federal government could intervene in public higher education on Constitutional grounds through legislation and judicial review, the Constitution itself must be examined. The basis for this involvement with education is contained in Article I, Section 8, which reads (in part):

> "The Congress shall have the power to lay and collect taxes, duties, imports, and excises, to pay the debts and provide for the common defense and general welfare of the United States---" (my emphasis).

While not interpreted prior to 1954 to mean the myriad of things it does today, this "general welfare" clause provided the eventual rationale for the federal government to become concerned with public higher education (as well as elementary and secondary education). Through the power to tax for education, came the power to exercise control over institutions of education. Once this door was found to be ajar, the federal government was able to exercise judicial review of public higher education due to Article III, Section 2 of the Constitution which reads (in part):

"the judicial power shall extend to all cases, in law and equity, arising under this Constitution---"

In other words, once higher education was deemed part of this nebulous "general welfare" clause, colleges and universities were subject to Constitutional provisions, and therefore, to judicial review by the federal courts.

Another part of the Constitution, Article IV, Section 2, though not used widely (if at all) in desegregation cases, could have been used due to its proviso that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." However, since blacks were still slaves in most of the South prior to the Thirteenth Amendment (1865), and were not given citizenship until the Fourteenth Amendment (1868)- which was a much more forceful statement of privileges for all citizens- this Constitutional safeguard probably can be regarded as superfluous after 1868, and not applicable to blacks before 1868.

Before looking at the Thirteenth and Fourteenth Amendments, two others need to be stated, then all four can be discussed in the context of desegregation. These two are Articles IX and X of the Bill of Rights, commonly referred to as the 9th and 10th Amendments, which state, respectively:

IX. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

On December 18, 1865 Congress ratified an amendment, the thirteenth, to the Constitution that made into law the forceful statements of Abraham Lincoln in the Emancipation Proclamation. This amendment states:

> "Section I. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce the article by appropriate legislation."

Finding that simply declaring blacks to be free was not enough to ensure their safety or to prevent them from being mistreated, the Congress further strengthened the position of minorities in the United States by ratifying the Fourteenth Amendment on July 28, 1868. This amendment, in part, states:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process by law; nor deny any person within its jurisdiction the equal protection of the laws."

Upon reading these various provisions of the Constitution, and especially the Fourteenth Amendment, one might well question the lackadaisical role of the federal government in education, both public school and higher education, prior to 1954. The Fourteenth Amendment clearly states that no state could enact a law that abridged the privileges of a citizen, or deny any person equal protection of the law. Yet after this amendment was ratified, state after state passed laws concerning higher education which effectively denied blacks both the privileges and the equal protection which whites enjoyed (see Statutes section following),

and the federal government not only failed to intervene by passing appropriate federal statutes, but actually seemed to put its stamp of approval on segregated education through a U.S. Supreme Court decision (see Plessy v. Ferguson in Cases section).

Basically, this lack of legal or political action on the part of the federal government can be explained by the manner in which these Constitutional provisions were interpreted. As you recall, the Tenth Amendment reserved certain powers not given to the United States for the various states. Because of this, and the fact that education was not one of the Constitutionally defined functions of the United States, public education in general, and higher education in particular, was regarded as a "state's right," until the Morrill Act of 1862 (see Statutes section following), which marked the first involvement of the federal government in public higher education, under the "general welfare" provision. Even at that, the Morrill Act - first introduced as a bill before the Civil War - failed to pass Congress until the Southern States withdrew from the United States, taking the most adamant proponents of state's rights with them. These Southern advocates of state's rights simply asserted that the federal government had no right to become involved in higher education, which they regarded as being an exclusive domain of the state to regulate, license and control. Proponents of the Morrill Act, on the other hand, pointed both to the "general welfare" clause of the original Constitution and to the Ninth Amendment ("enumeration--of certain rights shall not be construed to deny or disparage others retained by the people") as the rationale for federal involvement in higher education. This argument between factions became moot when the Morrill Act was passed, however, because the legal precedent was set.

Therefore, the lack of federal involvement in the desegregation of higher education before 1862 is easy to comprehend; there was simply no federal involvement of any kind in higher education.

However, after 1862, the federal government could have intervened in higher education based on the Morrill precedent, and could have become involved in desegregation after 1868, with the Fourteenth Amendment as a basis for action. That it did not do so is both a reflection of the continued political struggle between state's rights and federal control, and the legal precedents set in court decisions in Massachusetts (see Roberts v. City of Boston in Cases section) and in the District of Columbia (Plessy v. Ferguson). In these cases, both the district court judge in Massachusetts and the U.S. Supreme Court interpreted the Constitutional safeguards against inequity based on race (state constitution in Roberts and U.S. Constitution in Plessy) as not being applicable as long as "separate but equal" facilities were made available to the different races.

As a way of illustrating this interpretation of the U.S. Constitution, consider an action by 100 members of Congress taken in 1958 following several desegregation cases involving higher education. Nineteen Senators and eighty-one Representatives joined in issuing a "Declaration of Constitutional Principles", commonly referred to as the Southern Manifesto, which stated (in part): (Blackwell, 1961., p. 115)

> "We regard the decision of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the federal judiciary, undertaking to legislate in derogation of the authority of Congress, and to encroach upon the reserved rights of the state and the people.---

> The original Constitution does not mention education. Neither does the Fourteenth Amendment or any other amendment. The debates preceding the submission of the Fourteenth Amendment clearly show that there was no intent that it should affect the systems of education maintained by the states."

With these thoughts in mind, let us now examine the laws - both federal and state - which affected the higher education of blacks prior to 1954.

Statutes - Federal and State

As the result of the general regard of higher education as a state's right by the courts and the federal government, and the hesitancy of both to intervene in this sphere of state influence, twenty-one states (mostly Southern) and the District of Columbia had passed statutes prior to the Civil War either mandating or allowing systems of racially segregated public schools and colleges (see Introduction), and in some states even private instruction was forbidden by law (Ala. Laws 1831, sec. 10, p. 16; Fla. Acts 1846-47, ch. 87, sec. 9, p. 44; Mo. Laws 1846, p. 103; N. C. Laws 1830, ch. VI, sec. 2, p. 11 and N. C. Rev. Stats. 1837, ch. 111, sec. 27, p. 578; S. C. Laws 1834, ch. 5, sec. 1, p. 13; 1 Va. Rev. Code 1819, ch. 111, secs. 15-17, pp. 424-25 and Va. Laws 1830-31, ch. 39, secs. 4-6, pp. 107-08) The federal government, however, prior to the Civil War, took no action at all in regard to higher education segregation in the way of Congressional action, and following the war, made only a token effort to become involved until 1954.

With passage of 13 Stat. 507 (Act of March 3, 1865) the Bureau of Refugees, Freedmen and Abandoned Lands was created by the U.S. Congress. Among its other duties, this new member of the federal bureaucracy immediately undertook supervision of all the public colleges for blacks in the South, yet made no attempt to deal with segregation. Instead, because of the tremendous increase in the number of dual public school systems in the South following the war, the agency recommended that a number of black public colleges be established, separate from white institutions,

for the purpose of educating black teachers. As reported by the U.S. Commission on Civil Rights (1960, p. 4):

> "the Superintendent (of the Bureau) pointed out the need for normal schools to train Negro teachers. He claimed that at least a million of the 4 million freedmen were ready and eager 'to engage in the study of books.' Twenty-thousand teachers were needed, he asserted, and the North could be counted on for only a few thousand and the South for only a handful."

This recommendation by the Bureau, coupled with an emerging need for teachers and the work of northern religious organizations between 1865-1871 in establishing colleges for blacks in the South, "played an important part in educating the Negro of that day, but, together with the policies of the Federal Government, it also contributed to the firm foundation of racial segregation in colleges in the South." (U.S. Commission on Civil Rights, 1960., p. 5) As a result of these political and social forces, state-supported institutions for training black teachers were soon founded in Missouri (Mo. Laws 1870, p. 136), Alabama (Ala. Acts 1873, p. 173), Arkansas (Ark. Laws 1873, No. 97, p. 23), North Carolina (N.C. Laws 1876-77, ch. 234, secs. 1, 2), Louisiana (La. Constitution 1879, article 231), Texas (Texas Laws 1879, ch. 159, p. 181), Virginia (Va. Laws 1881-82, ch. 266, p. 283), and Florida (Fla. Laws 1887, ch. 3692, see 4, p. 37).

While these efforts were mainly concentrated on founding black teachers' colleges, the first real effort was underway to provide black colleges that were not devoted solely to training teachers. The federal government was responsible for this program, which was a by-product of its program to establish land-grant institutions in all of the states under the Morrill Acts of 1862 and of 1890. The original Morrill Act in 1862

(ch 130, 12 Stat. 503) eventually led to the establishment of agricultural and mechanical colleges in all of the Southern States, but only three of them (Mississippi in 1871, Virginia in 1872, and South Carolina in 1872) made any attempt to share the land grant monies with Negro colleges until the second Morrill Act in 1890 (ch. 841, 26 Stat. 417, 7 U.S.C. secs. 321-28 (1958)). This second act had a great impact on the establishment of black colleges in the South, due to a clause prohibiting the payment of land-grant monies to any state (or territory) for the support of a college or university which discriminated on the basis of color or race in the admission of students (7 U.S.C. sec. 323). There was a provision in this clause, however, which stated that separate colleges for the races would constitute compliance with the law if the funds received by the states were equally divided among the races. At this point, the official doctrine of "separate but equal" colleges for black and whites had its origin, firmly rooted in legal and political action by the U.S. Congress.

At the time that this federal statute became law in 1890 (or shortly thereafter), SEVENTEEN states had legislated mandatory separate systems of public school education for blacks and whites (Alabama 1875, Arkansas 1866-67, Delaware 1897, Florida 1865, Georgia 1870, Kentucky 1873-74, Louisiana 1898, Maryland 1865, Mississippi 1878, Missouri 1875, North Carolina 1868-69, Oklahoma 1897, South Carolina 1895, Tennessee 1870, Texas 1869-70, Virginia 1902, and West Virginia 1866), but none required separate systems for higher education of the races. However, separate systems came into being by choice during this period in most Southern states, and three states made such systems mandatory for higher education between 1901 - 1907 (Tennessee Laws 1901, ch. 7, p. 9; Kentucky Acts 1904,

ch. 85, pp. 181-182; Oklahoma Laws 1907-1908, ch. 77, article X, sec. 5, p. 695). One note of interest is that following the Civil War, two Southern States (Louisiana and South Carolina) actually adopted new constitutions which prohibited racially separate public schools, including racially separate colleges (Louisiana Constitution 1868, title VII, article 135 and South Carolina Constitution 1868, article X, sec. 3 and 10). These constitutions, however, were later rescinded, and separate school systems for the races were required (in 1898 and 1895, respectively).

Following this period of activity in establishing separate institutions of higher learning for blacks and whites, a period of relative calm ensued. From roughly 1900-1921, these new colleges for blacks and whites experienced the usual growing pains, but had very little interference from either the states or the federal government concernig admissions policies, dual system maintenance, or anything else relative to racial problems. While initially satisfied with the requirements of the federal government for "separate but equal" colleges and universities, black students slowly began to become dissatisfied with some of the facilities and conditions under which they were studying, and agitation for better conditions ensued. The black colleges, it seems, while receiving equal funding from monies provided under the Morrill Acts, were falling far behind the white public colleges in terms of public donations, state appropriations, and other sources of revenue. The result of this funding imbalance was especially noticible in the graduate and professional schools of the black institutions, which either did not exist or were of very poor quality. Primarily due

to the lack of opportunity for advanced study at black schools, black students began to apply for admission to the white institutions' graduate schools, causing these institutions to turn to their state legislators for a solution. This call for help led to the next significant statutory development for higher education in 1921, when the Missouri Legislature, due to increasing pressure from blacks to attend the graduate and professional schools at white institutions in Missouri, passed a statute which authorized the payment of tuition fees for any black that wished to enroll in a university in another state, to take a course of study that was offered at the University of Missouri, but was not available at Lincoln University, Missouri's official black university (Mo. Laws 1921, p. 87). West Virginia (W. Va. Acts 1927, ch. 10, p. 13), Maryland (Md. Laws 1933, ch. 234, p. 407), Oklahoma (Okla. Laws 1935, ch. 34, p. 138), Kentucky (Ky. Acts 1936, ch. 43, p. 110), and Virginia (Va. Acts 1936, ch. 352, p. 561) voluntarily enacted similar statutes, while Tennessee (Tenn. Acts 1937, ch. 256), North Carolina (N.C. Laws 1939, ch. 65, p. 88) and Louisiana (La. Acts 1946, No. 142, p. 412) soon followed, due primarily to pressure from the courts. By 1948, Texas (Texas Special Laws 1939, ch. 8, p. 310), Arkansas (Ark. Acts 1943, ch. 345, p. 769), Alabama (Ala. Acts 1945, No. 64, p. 61), Florida (Fla. Laws 1947, ch. 24124, sec. 1), and Mississippi (Mis. Laws 1948, ch. 282, p. 306) had joined the others in enacting a tuition grant program for blacks, making a total of 14 states. Although, in some cases, these programs were probably made in good faith as an effort to reduce inequality of educational opportunity, "they eventually became the Achilles' heel in the structure of segregated education under legal attack." (U.S. Commission on Civil Rights, 1960, p. 15)

With the advent of continual and repeated attacks on both the separate but equal doctrine and the tuition grant concept (see Cases section to follow), legislators in the Southern States began to become more and more nervous about the prospect of having to set up costly separate but equal graduate and professional schools for blacks (see Sipuel v. Board of Regents in Cases section), which might soon become illegal. In order to deal with this problem, the Governors of fourteen states having separate systems of higher education met during February, 1948 in Florida, and drew up a plan entitled the Southern Regional Education Compact. This proposal, ratified later by all the states present except West Virginia, declared the entire territory of the ratifying states to be a single region, and provided for the establishment of several cooperatively owned and operated regional educational institutions, for both blacks and whites, for the purpose of advanced study on the graduate and professional level. In order to attend an institution, however, a person would have to reside in a state other than the one in which the institution was located, thus effectively preserving the separate status of the institutions of higher education and the tuition grant program. This compact was then presented to Congress for consideration in May, 1948, where it reported out of the Senate Committee on the Judiciary (thereby passing that body). When a joint companion resolution passed out of the House of Representatives and was brought to the floor of the Senate, however, the Senate failed to adopt it by a 38-37 vote, thereby killing the plan (U.S. Commission on Civil Rights, 1960, p. 27).

In order to shed more light on the effect of the statutes and Constitutional provisions presented so far, the next section of this paper covers some of the important cases dealing with desegregation both prior to and including the Brown decision.

Cases

While not dealing with higher education, the first case of note which concerned the admission of blacks into white schools, and dual school systems as well, was Roberts v. City of Boston (59 Mass. 5 Cush. 198; 1849), in which the doctrine of "separate but equal" was first promulgated. Roberts, a black child, applied for admission to a "white" school much closer to her home than the "colored school" in her district. Rejected, her parents filed suit on the basis that her rejection was a violation of the bill of rights of the Commonwealth of Massachusetts, which prohibited discrimination on the basis of race. True to the general climate of the time, the current U.S. Constitutional interpretation, and in the absence of any federal statutes on the matter, the State Supreme Court rejected the argument that segregation by race in the public school system constituted discrimination, and ruled in favor of the defendent.

This case typified legal opinion on school segregation, and, as such, constitutes the only case reported at any judicial level concerned with the education of blacks in white schools until the case that became the precedent setting case for the next half-century, Plessy v. Ferguson (163 U.S. 537; 1896).

While concerned with segregation in transportation rather than higher education, the Supreme Court's opinion in Plessy mentioned separate schools as being examples of permissably separated institutions or activities, and held that although the object of the Fourteenth Amendment "was undoubtedly to enforce the absolute equality of the races before the law," the Court would not read into the amendment "any intent to enforce social, as distinguished from political, equality" (163 U.S. at 544). Citing Roberts, the Court said: (163 U.S. at 550-551).

> "---we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures."

By making this reference to school segregation, the Supreme Court was regarded as having put its blessing on racial segregation in public educational institutions, from grade school through professional school, and Plessy was constantly cited as the rule to follow in case after case involving the desegregation of higher education.

Thus, while recognizing the intent of the Fourteenth Amendment as being to assure equality, a majority of the justices considered equality to differ when presented in a social context and in a political context. Justice Harlan, in dissent, stated rather firmly: (163 U.S. at 562)

> "The arbitrary separation of citizens, on the basis of race---is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution."

Undaunted by Harlan's opinions concerning equality, the Supreme Court again upheld segregated higher education in a case involving a private college in 1908. Berea College v. Commonwealth of Kentucky (211 U.S. 45, 53L.Ed. 81, 29S.Ct. 33(1908), affirming 123 Ky. 209, 94 S.W. 623 (1906)) involved a case in which Berea College, a private school, admitted both black and white students, in violation of the Kentucky statute forbidding and penalizing the teaching of white and black pupils in the same institution. Berea sued to test the constitutionality of the statute on the grounds

that it was an arbitrary restriction of the right of teachers to earn a livlihood by imparting instruction, and was therefore a deprivation of a substantial property right guaranteed under the Fourteenth Amendment. Kentucky defended the statute as a proper exercise of its reserved power to amend or repeal the charter of a college. The Kentucky Court of Appeals decided that the statute was severable in its application to corporate institutions and to individual teachers, and gave separate reasons for upholding its constitutionality in each of its applications. The U.S. Supreme Court affirmed, stating that, "The validity of the act as applied to corporations could not be affected by the possible invalidity under the Federal Constitution of its application to individuals;" in other words, the Court effectively decided that "the matter of segregation of the races in (higher) education was one to be left entirely to the States." (U.S. Commission on Civil Rights, 1960., p. 13)

Relying on guidelines established by these two U.S. Supreme Court cases, the Michigan State Supreme Court decided in Booker et al v. Grand Rapids Medical College (156 Michigan, 95, 126 NW 589, 1909) that "private institutions of learning, though incorporated, may select those whom they will receive, and may discriminate by sex, age, proficiency in learning, and otherwise." The case involved two blacks who completed the first year of a three year course in veterinary medicine at a private college, and were denied admission to the second year solely because white students objected to their presence. The Michigan Court refused a writ of mandamus on the grounds that "this extraordinary remedy is not available for the enforcement of a private contract."

The first significant challenges to segregated public higher education began in 1933 when a graduate of North Carolina College for Negroes at Durham, Thomas R. Hocutt, applied to the University of North Carolina's School of Pharmacy for admission, but was rejected on the grounds that his application was not complete. He filed suit to obtain a court order directing his admission to the university, but lose his case in a lower court, and could not appeal because the president of the College for Negroes refused to certify his scholastic record. (U.S. Commission on Civil Rights, 1960. p. 15 - no case number or cites given). Then in 1936, Pearson and Regents of the University of Maryland v. Murry (182 Atl. 590. Md. 1936) became the first case concerned with the tuition grant method of achieving educational equality. A black resident of Maryland, academically qualified for admission to the State University College of Law, petitioned for a writ of mandamus to compel the regents to admit him, on the grounds that the state's offer to pay his tuition in some institution outside the state did not constitute an offer of substantially equal privileges, because it would entail moving his residence a considerable distance, involve traveling expenses and augmented living costs, which would be prohibitive. Furthermore, he would not obtain the advantage of studying law in the same state in which he expected to practice. His petition was granted by the Baltimore City Court, and the judgment was affirmed by the Maryland Court of Appeals, holding that "otherwise the petitioner would be denied a right guaranteed by the Fourteenth Amendment." This decision, hailed as the first progressive step in higher education by black leaders, sent shock waves throughout the South. However, as Murray was a decision by a state court, it was not regarded as establishing legal precedent for other states to follow.

Gaines v. Canada (305 U.S. 337. 1938), on the other hand, was a similar case decided by the U.S. Supreme Court and, as such, helped to sound the death knell for the tuition-grant program. Lloyd Gaines. a graduate of Lincoln University (Missouri), an honor student and president of his senior class, applied for admission to the University of Missouri Law School, but was rejected because he was black and the state constitution required separate education of the races. After losing his claim in the lower courts and the State Supreme Court of Missouri, the case was heard by the U.S. Supreme Court on appeal. The opinion, written by Chief Justice Hughes, contained the strongest language yet on the subject of higher education for blacks. Although not addressing the "separate but equal" doctrine, the Court stated;

> "To require a Negro in all respects eligible for admission to a college maintained by the state to forgo attendance there and to attend an out-of-state college, even with a state subvention, is not a satisfaction of his constitutional rights to equal treatment without regard to race."

and went on to say:

> "The basic consideration is not as to what sort of opportunities other states provide or whether they are as good as those in Missouri but as to what opportunities Missouri itself furnishes to white students and denies to Negroes solely on the ground of color---By the operation of the laws of Missouri a privilege has been created for a white law student which is denied to Negroes by reason of their race. The white resident is afforded legal education within the state; the Negro resident having the same qualifications is refused it there and must go outside the state to obtain it. That is a denial of the equality of a legal right to the enjoyment of the privilege which the state has set up, and the provision for the payment of tuition fees in another state does not remove this discrimination."

The impact of this decision was immediate. As Stephen L. Wasby et al state in their 1977 book: (Wasby et al, 1977. p. 52)

> "Gaines thus helped establish the tradition of 'overnight graduate schools' for Negroes in the Southern States. Under this practice, as soon as Negroes filed suits for admission to white graduate schools 'equal' facilities in the desired field of study were set up virtually overnight, in existing Negro state institutions."

These statements do have some basis in fact, as North Carolina took the first voluntary action to comply with Gaines by establishing the first departments for the study of law, pharmacy and library science at the North Carolina College for Negroes in Durham (N.C. Laws 1939, ch. 65, sec. 2, p. 88). Soon to follow were Tennessee (Tenn. Acts 1941, ch. 43, p. 136), Louisiana (La. Acts 1946, No. 142, p. 412), and South Carolina (S.C. Acts 1946, No. 223, p. 401). Of the states whose systems were challenged by the Gaines case, only West Virginia turned to desegregation rather than "separate but equal" for a solution. (U.S. Commmission on Civil Rights, 1960. p. 23)

Ten years passed before the next major test for the nation's institutions of higher education, which occurred when the U.S. Supreme Court reversed the Oklahoma Supreme Court's decision in Sipuel v. Board of Regents (332 U.S. 631. 1948). Ada Sipuel, a black female, applied for admission to the University of Oklahoma Law School, was rejected, and sued in district court to gain admission. Oklahoma had no other law school. The district court ruled for the defendent, Sipuel appealed to the State Supreme Court, which ruled that the lower court's judgment was correct because the State had not had enough time nor sufficient notice to set up a separate law school for Negroes for her. The U.S. Supreme Court reversed this decision, however, ruling that the state's duty under the Fourteenth Amendment's equal protection

clause was not affected by the plaintiff's failure to demand the establishment of a separate law school. Stating that "the State must provide it (legal education) for her in conformity with the equal protection clause of the 14th Amendment and provide it as soon as it does for applicants of any other group," the case was remanded to the Supreme Court of Oklahoma for retrial," not inconsistent with this opinion." The Oklahoma Court, refusing to comply with the intent of the Supreme Court decision, ordered that: 1) until a separate law school could be established, Sipuel was to be enrolled at the Oklahoma Law School until such a school could be readied, or 2) that no one be admitted to the Oklahoma Law School, and 3) that if a separate law was established, then Sipuel could not be enrolled at the Oklahoma Law School. Oklahoma then opened up a one-student law school for Miss Sipuel called the Langston School of Law, which she refused to attend. Instead, she filed suit (as Mrs. Fisher) along with five other blacks who were applying to the University of Oklahoma graduate and professional schools, and requested the U.S. Supreme Court to review the decision of the Oklahoma State Supreme Court. In the meantime, all the applicants were rejected for admission to the University on the basis of this State Supreme Court decision. The U.S. Supreme Court then ended the issue by denying Sipuel-Fisher's petition and sustaining the order of the State court, and all six of the applicants failed to gain admission to the university.

Meanwhile, the decision in McLaurin v. Oklahoma State Regents (87 F. Supp. 526, W.D. Okla. 1948), a class action suit on behalf of a

black male, required the University of Oklahoma to admit all blacks "similarly situated" to graduate and professional study. McLaurin, on the basis of this court order, entered the graduate school for advanced studies in education in 1948, but the other applicants who had joined the Sipuel-Fisher petition and then tried to gain admission under McLaurin were denied admission by the district court on the basis that they had pursued alternative remedies, and lost. As a result of the McLaurin and Sipuel decisions, the Governors of 14 states met and drew up the Southern Regional Education Compact (discussed in the Statutes section); at this point, it was obvious that the "separate but equal" doctrine for higher education was crumbling very fast. Then came the case that, for all intents and purposes, effectively ended segregation in higher education at the graduate and professional levels. In Sweatt v. Painter (399 U.S. 629-1950), the U.S. Supreme Court heard a case involving the State of Texas, which had established a separate law school for blacks. The plaintiff, Sweatt, was not satisfied with the equality of the facilities in spite of the fact that professors from the University of Texas were to lecture there. Agreeing with Sweatt, the Court stated;

> "In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review, and similar activities, the University of Texas Law School is superior."

and went on to say that tradition, standing in the community, experience of the administration and other qualities incapable of objective measurement, all combine to make equality impossible. Moreover, "the law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts," which the Court said was the case when the "law school to

which Texas is willing to admit petitioner excluded from its student body members of the racial groups which number 85 percent of the population of the state and include most of the lawyers, witnesses, jurors, judges, and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School."

Thus, for the first time, the U.S. Supreme Court had made a definitive statement regarding separate but equal facilities for the races. Unfortunately, the decision as written, was regarded as being applicable only to graduate and professional study, and was not applied to cases involving undergraduate admissions.

While Sweatt was in the process of reaching the U.S. Supreme Court, a voluntary attempt was being made to admit blacks to graduate classes at the University of Arkansas. In early 1948, Silas Hunt became the first black to be admitted to the University of Arkansas Law School (U.S. Commission on Civil Rights, 1960. p. 28), and later that year another black was admitted to the Medical School and yet another again to the Law School. During 1948 another black, W. A. Branton, applied to the undergraduate school at the University of Arkansas, but was rejected. (N.Y. Times, Feb. 3, 1948, p. 27) While, on the surface, this appeared to be somewhat of a breakthrough on the graduate level, in reality it became a subterfuge for another form of segregation for, once admitted, these black students were assigned to racially segregated

classrooms, living quarters, and in the case of McLaurin at the University of Oklahoma, racially segregated study areas in the library and an assigned time to eat in the cafeteria when no one else was present, as well. While the University of Arkansas ended this "segregation within the university" policy during the 1949-50 academic year, and Delaware soon followed Arkansas' lead in admitting blacks to graduate school, the University of Oklahoma continued to practice this new form of discrimination.

Having admitted G. W. McLaurin to the University of Oklahoma in 1948, the Oklahoma Legislature amended their segregation laws on May 28, 1949 to allow the admission of blacks to white institutions, but still required that all courses be given "on a segregated basis" (Okla. Acts 1949, ch. 15, p. 609). McLaurin filed suit to end this practice, and in McLaurin v. Oklahoma State Regents (339 U.S. 637, 1950) the U.S. Supreme Court was called upon to decide the issue. Reacting to testimony that the plaintiff was "required to sit apart at a designated desk in an anteroom adjoining the main classroom, to sit at another designated desk on the mezzanine of the library, and to sit at yet another designated table in the cafeteria, which he had to use at a different time from other students," the court said in ordering these practices stopped:

> "It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference - a Constitutional difference - between restrictions imposed by the state which prohibit the intellectual commingling of students and the refusal of individuals to commingle where the state presents no such bar--- But at the very least, the State will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits."

Sweatt and McLaurin, then, proved to be the final blows against segregated education on the graduate level. Following these cases, state and federal courts ordered the admission of black students to white universities in Virginia (Swanson v. University of Virginia Civ. No. 30, W.D. Va. 1950), Louisiana (Wilson v. Board of Supervisors, 92 F. Supp. 986, E. D. La. 1950), North Carolina (McKissick v. Carmichael, 187 F.2d 949, 4th Cir. 1951), and Tennessee (Gray v. University of Tennessee, 100 F. Supp. 113, E. D. Tenn (1951). By 1954, when Brown and the other school segregation cases were decided, 12 of the 17 states that had maintained segregation in higher education had opened their doors to blacks at the graduate and professional levels (U. S. Commission on Civil Rights, 1960. p. 36), but the undergraduate schools, by and large, were still segregated.

Several cases had been decided in state courts concerning the desegregation of undergraduate programs prior to 1954, including Toliver v. Board of Education (230 S. W. 2d 724, 1950) in Missouri, which affirmed the right of the states to continue the practice of segregated undergraduate education, but several cases also were decided during this period which forced undergraduate desegregation on the states involved. In Parker v. University of Delaware, (75 A.2d 225, 1950), the court found such a great inequity between courses offered at the white and black institutions that it ordered the admission of blacks to the university in undergraduate programs, and similar decisions were reached in Battle v. Wichita Falls Junior College District (101 F. Supp., 82, N. D. Texas (1951) and in Constantine v. Southwestern Louisiana Institute,

(120 F. Supp. 417, W. D. La. 1954). Both of these latter cases, however, were decided more on the factor of cost involved in blacks attending colleges outside their own locality being a violation of their rights than the actual practice of discrimination per se. Such was the state of affairs in higher education when the U. S. Supreme Court was called upon to decide the issue of segregated public schools in Brown v. Board of Education of Topeka.

Graduate and professional education was effectively desegregated, but with a few minor exceptions, undergraduate programs were still operated on a separate but equal basis. Even after Brown, segregated undergraduate education continued, based on the premise that Brown really didn't apply to higher education, due to some of the inherent differences between higher education and the public schools (see Introduction section to this paper). Rather than present Brown in this paper, as it does concern desegregation of public schools, the U. S. Supreme Court's decision, without opinion, in Frazier v. Board of Trustees of the University of North Carolina (134 F. Supp. 589, M. D. N. C. 1955; affirmed, 350 U.S. 979, 1956), affirming the decision of a three-judge district court, provides perhaps the best statement of the applicability of Brown and the other school segregation cases to higher education. The facts are as follows.

The plaintiffs, three black graduates of an accredited high school in Durham, N. C., applied for admission to the undergraduate school of the University of North Carolina (Chapel Hill) on April 19, 1955. Despite the fact that they were in compliance with admission regulations,

all three received identical letters on April 27 from the Director of Admissions informing them that the Trustees of the University had not changed the policy on admission of blacks, who were eligible to make application for graduate and professional studies not offered at a Negro college in the state, but who were not eligible at that time for admission to the undergraduate schools. The three youths requested the University to reverse this policy, and the Board of Trustees, in reply, passed a resolution on May 23, 1955 to the effect that since "millions of dollars had been spent to create separate but equal" facilities for all races, the policy was that "applications of Negroes to the undergraduate schools of the three branches of the Consolidated University would not be accepted." The three youths then filed suit, seeking a declaratory judgment that these orders of the Board of Trustees were in violation of the equal protection clause of the Fourteenth Amendment, and a restraining order to prevent the University and the Board of Trustees from denying admission to blacks solely because of their race and color.

Judge Soper, noting that the Board of Trustees' last action had come after Brown had been decided, observed that:

> "The only answer to this far reaching decision, and the only defense on the merits of the case offered by the defendants in this suit is that the Supreme Court in Brown v. Board of Education of Topeka, Kansas, decided that segregation of the races was prohibited by the 14th Amendment only in respect to the lower public schools and did not decide that the separation of the races in schools on the college and university level is unlawful. We think that the contention is without merit. That the decision of the Supreme Court was limited to the facts before it is true, but the reasoning on which the decision was based is applicable to schools for higher education as to schools on the lower level. Chief Justice Warren, speaking for the Court, said:

> 'Today, education is perhaps the most important function of state and local governments. Compulsory attendance laws and the great expenditures for education both demonstrated our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity for education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.'

Warren, in Brown goes on to say:

> 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.'

And concluded that:

> 'We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.'"

Judge Soper, after these observations, concluded that:

> "In view of these sweeping pronouncements, it is needless to extend the argument. There is nothing in the quoted statements of the court to suggest that the reasoning does

not apply with equal force to colleges as to primary schools. Indeed, it is fair to say that they apply with greater force to students of mature age in the concluding years of their formal education as they are about to engage in the serious business of adult life-----."

Conclusion

As the Cases section clearly shows, the U.S. Supreme Court's interpretation of the United States Constitution in respect to the public education of blacks in institutions of higher learning changed drastically from 1896 (Plessy) to 1955 (Frazier). While at first finding that the provisions of the 14th Amendment for equal protection of the law was applicable only to political situations, and not to social issues, the Court slowly came to recognize social inequality as being as pervasive, and possibly more destructive, than political inequality. In the face of state statutes either mandating or allowing segregated higher education in 21 states, and the lack of federal statutes addressing the issue or of Supreme Court guidelines to follow, black students were forced to endure conditions that were detrimental to their educational advancement when compared to the opportunities of white students for a period of 86 years following ratification of the 14th Amendment, which ostensibly gave them all the "rights, privileges and immunities" of white citizens.

The reasons for this long delay are clear. The failure of the federal government to intervene in a matter which was considered a state's right is the most obvious. Behind the scenes political pressures from large groups of voters in the Southern States made desegregation of higher education a very unpopular issue for Congress, and unpopular issues are seldom addressed in serious fashion. And finally, the intent of the Congress when it ratified the Fourteenth Amendment, as well as the intent of the original framers of the U. S. Constitution and the Bill of Rights, seemed unclear to the federal judiciary for many years, as it still does today.

Following Brown, a number of cases have reached the U. S. Supreme Court concerned with desegregation of higher education, including Lucy v. Adams, Frazier, & Hawkins v. Board of Control to name but a few, and more recently, cases concerning affirmitive action and reverse discrimination, such as Bakke, & DeFunis v. Odegaard have added a new dimension to the already complex issue of discrimination in higher education. Where these and other cases will lead is somewhat uncertain, but what seems clear following a review of the first 150 years of political and legal action and its effect on the desegregation of higher education, is that this political and legal pressure, along with social pressures, will result in an everchanging interpretation of the magnitude and scope of the U. S. Constitution, the Fourteenth Amendment, and of the statutes and regulations proposed by the federal government for dealing with equality of the law in higher education.

In conclusion, I would advise today's college administrator to be aware of the past and to anticipate the future by remaining attuned to U. S. Supreme Court decisions, when developing and implementing policies related to admissions, affirmative action, duplication of programs, and other race related issues in higher education.

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